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In the Supreme Court of the United States

OCTOBER TERM, 1946

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

UEBERSEE FINANZ-KORPORATION, A. G.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 934

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

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The respondent's heavy reliance upon implications of Section 12 of the Trading with the Enemy Act calls for a brief reply. See, *e. g.*, Brief for Respondent, pp. 6, 20. The Government has made the argument, among others, that the express authorization to hold, use, administer, liquidate, sell, or otherwise deal with property of any foreign national in the interest and for the benefit of the United States, conferred by Section 5 (b), as amended, is fatal to the continued existence of any right in a foreign national to compel return by suit under Section 9 (a). The respondent has

sought to meet this argument by suggesting that similar authorization was conferred by Section 12 during World War I and that such authorization was never regarded during World War I as a barrier to recovery by a nonenemy in a suit under Section 9 (a). If Section 9 (a) permitted a nonenemy to recover during World War I in spite of the existence of powers in the Custodian on their face inconsistent with an obligation to return, why, the respondent asks, should a different result follow in World War II?

The answer lies in the premise upon which the question is asked. The assumption that Section 12 conferred powers whose exercise would have been inconsistent during World War I with the obligation to return nonenemy property is erroneous. Section 12 was addressed to enemy (and ally-of-enemy) property only. It was not contemplated that the powers there conferred would be exercised with respect to any property the Custodian was under an obligation to return. The full text of Section 12 makes this quite clear. The opening paragraph of Section 12 prescribes what shall be done with "moneys" received by the Custodian; the second, what shall be done with "all other property *of an enemy, or ally of enemy.*" Paragraph four, quoted in the Brief for Respondent, is merely an additional grant of powers with respect to "property, other than money," and in view of the scope which the

opening paragraphs establish for the Section, there is no reason why this paragraph should be read as comprehending nonenemy property where the remainder of the Section clearly does not.

This view is confirmed by the practicalities of administration of the Act during World War I. As the Act then stood, the Custodian's powers under Section 7 (c) were limited to the property of enemies of allies of enemies. In the exercise of the seizure power, he could, it is true, acquire dominion over property which he mistakenly determined to be that of an enemy or ally of enemy. But since Section 9 (a) afforded the exclusive procedure for testing the correctness of his determination, the presumption that he had acted within his statutory authority necessarily prevailed until suit was brought under Section 9 (a). Until such suit was brought, therefore, any property which the Custodian held was deemed to be enemy or ally-of-enemy property. *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554; *Miller* v. *Lautenberg*, 239 N. Y. 132, 145 N. E. 907. Thus, it was only with respect to property which was either enemy or ally-of-enemy property in fact, or deemed to be so by virtue of a presumption which had not been disturbed, that the powers of Section 12 could be brought to bear. The powers embodied in Section 5 (b) to hold, use, administer, liquidate, sell, or otherwise deal

with vested property, on the other hand, are expressly applicable to any property or interest of any foreign country or national thereof.

Thus, as a practical matter, Section 12 powers would normally be exercised only in respect of property which was in fact within the scope of the seizure power specified by Section 7 (c), *i. e.* enemy or ally-of-enemy property. In view of the absence in the contemplated practical operations under the Act of any need to exercise Section 12 powers with respect to any but enemy or ally-of-enemy property, it was quite appropriate to limit the application of those powers, as the opening paragraphs of the Section appear clearly to do, to enemy or ally-of-enemy property.

This is confirmed by the legislative history of the part of Section 12 upon which the respondent relies. Originally, Section 12 conferred upon the Custodian only the powers of a common law trustee with respect to property seized pursuant to Section 7 (c). 40 Stat. 423. The broader power permitting the Custodian to act "in like manner as though he were absolute owner thereof" was added by the Urgent Deficiency Appropriation Act of 1918. 40 Stat. 460. The then Alien Property Custodian, Mr. A. Mitchell Palmer, testified before a Senate Subcommittee on Appropriations that the added power was needed because without it, "enormous profits" would be accruing for the owners of seized property. When Senator Martin asked Mr. Palmer if he

meant that he was "doing business for the *German* people instead of for your own country," Mr. Palmer answered "Absolutely." Senator Tillman then expressed his regret that under the original act the Custodian was in effect "making money for those whelps over there." The hearings, we submit, leave no doubt that Congress regarded *German, i. e.* enemy property, as the subject matter to which Section 12 would apply. See Hearings before a Subcommittee of the Committee on Appropriations on H. R. 9867, 65th Cong. 2nd Sess.

We conclude, therefore, from the text of Section 12, its place in the scheme of the Act, and its legislative history that the powers it confers were not intended to have any significant application to property which the Custodian would have been obliged to return in a suit under Section 9 (a). This being so, there is no foundation for the respondent's contention that a grant of powers in World War II inconsistent with a right to return should leave the right to return unimpaired as it did in World War I. In short, there was no such grant of powers during World War I, the powers granted by Section 12 being addressed to enemy or ally-of-enemy property.

The powers conferred by Section 5 (b) to hold, use, administer, liquidate, sell, or otherwise deal with any property or interest of any foreign country or national thereof in the interest and for the benefit of the United States, are, in our

view, irreconcilable with the respondent's construction of the Act. If, as the respondent argues, Congress had granted a vesting power intended only to permit immobilization of foreign property, it would have been appropriate to have granted accompanying powers limited to custody and conservation of the property pending determination of its status by suit under Section 9 (a). That Congress cast the accompanying powers in terms of an affirmative authority to use and dispose of vested property is wholly inconsistent with the objective of mere immobilization.

We believe that even if the accompanying powers had not been expressly added to Section 5 (b), the vesting power alone would bar a foreign national from recovering by suit under Section 9 (a). When Congress added the vesting power to Section 5 (b), it must be presumed to have done a meaningful legislative act. If, in spite of vesting as authorized by Section 5 (b), a foreign national could compel return, the vesting power would add nothing to what could have been accomplished by using the freezing powers. We submit that this incongruity, coupled with the Committee's explicit statement that a major objective was to make *foreign* property available for affirmative use (See Brief for the Petitioner, pp. 18–21), would be sufficient—without the overwhelming confirmation afforded by the accom-

panying powers—to compel the result for which we contend.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.
JOHN F. SONNETT,
Assistant Attorney General.
M. S. ISENBERGH,
Special Assistant to the Attorney General.

APRIL 1947.

APPENDIX

Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended (50 U. S. C. App. 1–31):

SEC. 12. That all moneys (including checks and drafts payable on demand) paid to or received by the alien property custodian pursuant to this Act shall be deposited forthwith in the Treasury of the United States, and may be invested and reinvested by the Secretary of the Treasury in United States bonds or United States certificates of indebtedness, under such rules and regulations as the President shall prescribe for such deposit, investment, and sale of securities; and as soon after the end of the war as the President shall deem practicable, such securities shall be sold and the proceeds deposited in the Treasury.

All other property of an enemy, or ally of enemy, conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder shall be safely held and administered by him except as hereinafter provided; and the President is authorized to designate as a depositary, or depositaries, of property of an enemy or ally of enemy, any bank, or banks, or trust company, or trust companies, or other suitable depositary or depositaries, located and doing business in the United States. The alien property custodian may deposit with such designated depositary or depositaries, or with the Secretary of the Treasury, any stocks, bonds, notes, time drafts, time bills of exchange, or other securities, or property (except money or checks or drafts

payable on demand which are required to be deposited with the Secretary of the Treasury) and such depositary or depositaries shall be authorized and empowered to collect any dividends or interest or income that may become due and any maturing obligations held for the account of such custodian. Any moneys collected on said account shall be paid and deposited forthwith by said depositary or by the alien property custodian into the Treasury of the United States as hereinbefore provided.

The President shall require all such designated depositaries to execute and file bonds sufficient in his judgment to protect property on deposit, such bonds to be conditioned as he may direct.

The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of the Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: Provided, That any property sold under this Act, except when sold to the United States, shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time

and place of sale which shall be where the property or a major portion thereof is situated, unless the President stating the reasons therefor, in the public interest shall otherwise determine: Provided further, That when sold at public sale, the alien property custodian upon the order of the President stating the reasons therefor, shall have the right to reject all bids and resell such property at public sale or otherwise as the President may direct. Any person purchasing property from the alien property custodian for an undisclosed principal, or for resale to a person not a citizen of the United States, or for the benefit of a person not a citizen of the United States, shall be guilty of a misdemeanor, and, upon conviction, shall be subject to a fine of not more than $10,000, or imprisonment for not more than ten years, or both, and the property shall be forfeited to the United States. It shall be the duty of every corporation incorporated within the United States and every unincorporated association, or company, or trustee, or trustees within the United States issuing shares or certificates representing beneficial interests to transfer such shares or certificates upon its, his, or their books into the name of the alien property custodian upon demand, accompanied by the presentation of the certificates which represent such shares or beneficial interests. The alien property custodian shall forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by him.

Any money or property required or authorized by the provisions of this Act to be paid, conveyed, transferred, assigned, or delivered to the alien property custodian

shall, if said custodian shall so direct by written order, be paid, conveyed, transferred, assigned, or delivered to the Treasurer of the United States with the same effect as if to the alien property custodian.

After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct: Provided, however, That on order of the President as set forth in section nine hereof, or of the court, as set forth in sections nine and ten hereof, the alien property custodian or the Treasurer of the United States, as the case may be, shall forthwith convey, transfer, assign, and pay to the person to whom the President shall so order, or in whose behalf the court shall enter final judgment or decree, any property of an enemy or ally of enemy held by said custodian or by said Treasurer, so far as may be necessary to comply with said order of the President or said final judgment or decree of the court: And provided further, That the Treasurer of the United States, on order of the alien property custodian, shall, as provided in section ten hereof, repay to the licensee any funds deposited by said licensee.

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